Supreme Court, U.S.
FILED
APR 7 1997
OFFICE OF THE CLERK

(3)

NO. 96-1236

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AMERICAN DEFENSE PREPAREDNESS ASSOCIATION/NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AMERICAN SHIPBUILDING ASSOCIATION, ELECTRONIC INDUSTRIES ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

Of Counsel:

GEORGE M. COBURN
Coburn Legal Consulting
JOHN J. KELLY
Electronic Industries Association
ROBERT A. LIPSTEIN
American Defense Preparedness Association/National Security Industrial Association
FRANKLIN W. LOSEY
American Shipbuilding Association

CLARENCE T. KIPPS, JR.*
Miller & Chevalier, Chartered
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Amici Curiae
**Counsel of Record*

14 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. *Krygoski* Jeopardizes the Enforceability of Government Contracts For Lack of Consideration and Mutuality 5

B. The Federal Circuit Erred by Assuming that the Government's Promise to Forbear from Acting in Bad Faith or Abusing its Discretion in Terminating for Convenience Provided Consideration for the Contractor's Promise to Perform the Work 8

C. The Confusion Created by *Krygoski* and Other T/C Decisions of the Federal Circuit Warrants Granting the Petition 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: Page

College Point Boat Corp. v. United States,
267 U.S. 12 (1925) 3, 5

Floyd v. United States,
26 Ct. Cl. 889 (1992), *aff'd*, 996 F.2d 1237,
cert. denied, 510 U.S. 925 (1993) 8

Kihlberg v. United States,
97 U.S. 398 (1878) 8

Krygoski Constr. Co. v. United States,
94 F.3d 1537 (Fed. Cir. 1996) ..... *passim*

Librach v. United States
147 Ct. Cl. 605 (1959) 8

Maxima Corp. v. United States,
847 F.2d 1549 (Fed. Cir. 1988) 9

Ripley v. United States,
223 U.S. 695 (1912) 4, 8

Salsbury Indus. v. United States,
905 F.2d 1518 (Fed. Cir. 1990),
cert. denied, 498 U.S. 1024 (1991) 9

Torncello v. United States,
681 F.2d 756 (Ct. Cl. 1982) ..... *passim*

United States v. Penn Foundry & Mfg. Co.,
337 U.S. 198 (1949) 3, 5

United States v. Winstar Corp.,
116 S. Ct. 2432 (1996) 4, 6, 7

United States v. Wunderlich,
342 U.S. 96 (1951) 8

Willard, Sutherland & Co. v. United States,
262 U.S. 489 (1923) 4, 7

STATUTES & REGULATIONS:

41 U.S.C. § 609(b) 8

48 C.F.R. § 49.101(b) 6

48 C.F.R. § 49.502 2

48 C.F.R. § 52.249-2(a) 2

MISCELLANEOUS:

Restatement (Second) of Contracts (1979) 4, 7, 8

John C. Cibinic & Ralph C. Nash,
Convenience Terminations: What Are the Limits? (1996) 9

John C. Cibinic & Ralph C. Nash,
Administration of Government Contracts (3d ed. 1995) 6

Peter Behr,
Contractors Set Record for Orders,
Wash. Post, Feb. 24, 1997. 5

NO. 96-1236

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AMERICAN DEFENSE PREPAREDNESS ASSOCIATION/NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AMERICAN SHIPBUILDING ASSOCIATION, ELECTRONIC INDUSTRIES ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The American Defense Preparedness Association/ National Security Industrial Association (ADPA/NSIA) is a national organization of more than 900 companies and 28,000 individual members dedicated to promoting awareness by all elements of American society of the need for a strong defense posture; identifying and studying problems affecting the common defense and national security of the United States; and encouraging mutual understanding and a close working relationship between American commerce and industry and those segments of the United

States government responsible for the common defense and national security. The American Shipbuilding Association is a national organization, and its six members are the major U.S. shipbuilders whose Government contracts account for over 95% of all new construction funds that are appropriated by Congress for the purpose of building ships for the U.S. Navy. The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The Shipbuilders Council of America is a trade association that promotes a sound private shipbuilding and ship-repair industry in the United States.

The Federal Circuit's decision in *Krygoski* jeopardizes the enforceability of government contracts containing termination for convenience ("T/C") clauses and is of paramount importance to Amici and their constituent members. Most of the government contracts to which Amici's members are parties contain T/C clauses similar to the one at issue in this case.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court should grant the petition because the decision of the Federal Circuit jeopardizes the enforceability of all government procurement contracts incorporating the standard T/C clauses mandated by the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 49.502. Under such a clause, "[t]he Government may terminate performance of the work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." *Id.* § 52.249-2(a). Upon such a termination, the clause deprives the contractor of the

full benefit of its bargain by limiting the contractor's recovery to payment for work done and denying recovery of profit on terminated work.

Evolution of the T/C clause shows that it was born of wartime necessity to provide the Government the right to end a procurement contract when the circumstances causing the contract to be made had substantially changed and it was apparent that continuance of the contract was not in the best interest of the Government. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 205-206 & nn. 2 & 3, 214-16 (1949) (Douglas, J., concurring). No statute currently addresses the scope of the T/C clause. Neither the regulations nor the terms of the clause contain any express limitation on its exercise. Nevertheless, it is incontrovertible that the T/C clause would make the government contract illusory and unenforceable by either party unless there are meaningful limitations on its exercise.

The Court of Claims' en banc plurality decision in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), recognized the need for a meaningful limitation on the exercise of the T/C power to provide consideration and mutuality to make the government contracts enforceable. The court viewed the T/C clause as allocating the risk when the expectations of the parties had substantially changed. Under such changed circumstances the contractor would be paid its costs and profit on the work performed but would not be entitled to anticipated profit. *Torncello* thoroughly considered and rejected "abuse of discretion" and "bad faith" by the contracting officer as limitations and reestablished the substantial change in circumstances limitation. *Id.* at 766-71.

The Federal Circuit's decision in *Krygoski Constr. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), incorrectly rejected the changed circumstances limitation established by the plurality opinion in *Torncello* and held that "abuse of

discretion" and "bad faith" were the only limitations on the Government's exercise of the T/C power. The *Krygoski* court failed to discuss the contract requirements for consideration and mutuality of obligations and assumed that abuse of discretion and bad faith were sufficient limitations on the use of the T/C power. *Krygoski* makes both the Government's and the contractor's promises unenforceable at contract inception and as to unperformed work because there can be no consideration to support them and no mutuality of promises.

The *Krygoski* Court failed to recognize that abuse of discretion is not a limitation when there are no criteria by which to measure its exercise. Furthermore, the contracting officer's obligation not to act in bad faith or abuse his discretion in terminating for convenience is a pre-existing legal duty, independent of any contractual obligations. *See, e.g., Ripley v. United States*, 223 U.S. 695, 702-704 (1912). Performance of such a duty is not consideration, RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979).

In interpreting the government contracts in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), seven members of the Court concluded that unless the Government-promised accounting treatment was binding on the Government, the contracts would be illusory for lack of consideration and mutuality. *Id.* at 2470-71 (plurality opinion), at 2473-74 (Breyer, J., concurring), and at 2477 (Scalia, J., concurring). That rationale is applicable here.

Lack of consideration and mutuality render a government contract unenforceable. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923). The *Krygoski* court failed to recognize that if the Government can walk away from the contract whenever it chooses to do so, the contractor is free to walk away from the contract whenever it chooses to do so. This would mean, contrary to the public interest, the contractor could refuse to perform if it underbid the contract

or could stop performance if it is losing money on the contract, and have the defense that the contract is unenforceable for lack of consideration. This side of the coin is the primary reason why the Court should grant the petition and clarify the rules that will govern the enforceability of government contracts.

The uncertainty and confusion created by *Krygoski* and other recent T/C decisions of the Federal Circuit further warrant granting the petition.

ARGUMENT

A. *Krygoski* Jeopardizes the Enforceability of Government Contracts For Lack of Consideration and Mutuality.

The decision of the Federal Circuit in *Krygoski Constr. Co. v. United* States, 94 F.3d 1537, 1545 (Fed. Cir. 1996), jeopardizes the enforceability of hundreds of billions of dollars of outstanding government contracts. In the Washington area alone, the federal government awarded over $20 billion in government contracts in fiscal year 1996. Peter Behr, *Contractors Set Record for Orders*, WASH. POST, Feb. 24, 1997, at A1.

The wartime predecessors to the T/C clauses authorized by Congress are described in the petition and the *Torncello* decision. *See Torncello v. United States*, 681 F.2d 756, 764-65 (Ct. Cl. 1982).[1] Since World War II, Congress has not enacted any law addressing the termination of contracts for

---

[1] For World War I and II contracts there was no recovery of anticipatory profits on terminated work. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 205-06 & nn. 2 & 3, and the concurring opinion of Mr. Justice Douglas, 337 U.S. at 214-16 (1949).

the government's convenience. *See* John Cibinic & Ralph C. Nash, ADMINISTRATION OF GOVERNMENT CONTRACTS 1074 (3d ed. 1995). Instead, the use of a prescribed T/C clause was made mandatory solely by government procurement regulations for defense contracts since 1950 and for civilian agency contracts since 1967. *Id.* FAR § 49.101(b) states that "the contracting officer shall terminate contracts whether for default or convenience, only when it is in the Government's interest." Beyond this bare statement, nothing is said in the FAR or in the termination clauses as to when termination for convenience may or may not be in the government's interest.

In *Torncello*, a plurality of the Court of Claims sitting en banc held that the government could not invoke the T/C clause unless "the circumstances of the bargain or the expectations of the parties have changed." 681 F.2d at 771. The principle underlying that analysis was that government contracts, like other contracts, must be supported by mutual consideration in order to be enforceable.

As the plurality in *Torncello* recognized, "[i]t is nothing more than basic contract law that a power to terminate must be limited in some meaningful way, as measured by the requirement of consideration." *Id.* at 772. In the absence of statutes under which Congress waives or restricts the application of the common law to government contracts, such as the wartime statutes discussed in *Torncello*, and in note 1 *supra*, common law principles generally govern the making and interpretation of government contracts. *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (plurality opinion), 2473 (Breyer, J., concurring), 2477-79 (Scalia, J., concurring) (1996), and cases there cited. One of those principles requires that, in order to be enforceable, an exchange of contractual promises must be supported by consideration. Specifically, seven members of the Court concluded in *Winstar* that unless the Government-promised

accounting treatment was binding on the Government, the contracts would be illusory for lack of consideration and mutuality. *Id.* at 2470-71 (plurality opinion), at 2473 (Breyer, J., concurring), and at 2477-78 (Scalia, J., concurring); *see also Willard, Sutherland & Co.*, 262 U.S. at 493; *Torncello*, 681 F.2d 756.

The standard T/C clause, taken literally, would render the Government's contractual obligations illusory. *Willard, Sutherland & Co.*, 262 U.S. at 493; *Winstar*, 116 S. Ct. at 2464-65, 2473, 2477-79. "Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise." RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, *Illusory Promises* (1979). Further, "if the promisor has an unfettered choice of alternatives, and one alternative would not have been consideration if separately bargained for, the promise in the alternative is not consideration." *Id.* Comment b, *Alternative promises.*

It is true that a contractual promise may be conditioned on a future event. In other words, a party can obligate itself, but also negotiate into the contract a condition the occurrence of which will excuse performance. But a conditional promise is illusory if the condition rests upon merely "the pleasure or future will of the promisor." Id. § 77 cmt. a. To avoid this result, the *Torncello* plurality restricted the government's use of the T/C clause to instances in which circumstances (beyond the sole control of the Government) surrounding the contract had changed.

By overlooking the basic contract rules of consideration and mutuality of obligation, the *Krygoski* court has jeopardized the enforceability of government procurement contracts, virtually all of which include a standard T/C clause. This is the primary reason for granting the petition.

B. The Federal Circuit Erred by Assuming that the Government's Promise to Forbear from Acting in Bad Faith or Abusing its Discretion in Terminating for Convenience Provided Consideration for the Contractor's Promise to Perform the Work.

The Federal Circuit's decision in *Krygoski* erred in assuming that abuse of discretion and bad faith are adequate limitations on the T/C power to preserve enforceability of the contracts.

Discretion cannot be abused when there are no limits on its exercise. *Torncello*, 681 F.2d at 771. Moreover, the decision fails to recognize that the contracting officer's obligation not to act in bad faith or abuse his discretion in terminating for convenience is a pre-existing legal duty, independent of any contractual obligations. *See, e.g., Kihlberg v. United States*, 97 U.S. 398, 402 (1878); *Ripley v. United States*, 223 U.S. 695, 702-704 (1912); *United States v. Wunderlich*, 342 U.S. 96, 102-103 (1951) (Jackson, J., dissenting); *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959); 41 U.S.C. § 609(b) (finality of board decisions). "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979). *See also id.* § 73 cmt. b ("A legal duty may be owed to the promisor as a member of the public, as when the promisee is a public official"). *See also Floyd v. United States*, 26 Cl. Ct. 889, 891 (1992), *aff'd*, 996 F.2d 1237 (Fed. Cir.), *cert. denied*, 510 U.S. 925 (1993).

These legal errors of the *Krygoski* court and the unenforceability consequences they portend lend further support to granting the Petition.

C. The Confusion Created by *Krygoski* and Other T/C Decisions of the Federal Circuit Warrants Granting the Petition.

The Federal Circuit applied the *Torncello* "changed circumstances" limit in *Maxima Corp. v. United States*, 847 F.2d 1549, 1555-56 (Fed. Cir. 1988). Thereafter, it wandered off course, spoke unkindly of *Torncello* and applied a "bad faith limit" in *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991). Following this new trend, the Federal Circuit in *Krygoski* misconstrued *Torncello*, and held that the changed circumstances test did not apply "because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises." *Krygoski*, 94 F.3d at 1545. The doctrine of consideration looks not, however, to whether a party "intends" to act in accordance with the contract, but to whether the party has in some way "obligated" itself to so act. Thus, a contract fails for lack of consideration when one party fails to promise such performance or leaves itself an "out" by which it can avoid performance should it later wish to do so.

The Federal Circuit's failure to address the fundamental contract requirements of consideration and mutuality of obligations in defining the criteria for exercise of the T/C power has created great uncertainty and confusion. *See* analysis by Professor Cibinic in John Cibinic & Ralph C. Nash, *Convenience Terminations: What Are The Limits?* ¶ 52 (1996).

Because the Federal Circuit has exclusive appellate jurisdiction over contract disputes involving the T/C clause, there is no prospect that other courts of appeals will help clarify this issue, and it is appropriate for this Court to act now to cure the disarray in the Federal Circuit by granting the petition in this case. *See* Pet. at 17-21.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:

GEORGE M. COBURN
Coburn Legal Consulting
JOHN J. KELLY
Electronic Industries Association
ROBERT A. LIPSTEIN
American Defense Preparedness Association/National Security Industrial Association
FRANKLIN W. LOSEY
American Shipbuilding Association

CLARENCE T. KIPPS, JR.*
Miller & Chevalier, Chartered
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Amici Curiae
**Counsel of Record*

APRIL 1997